Völkerrechtsblog
Der Blog des Arbeitskreises junger Völkerrechtswissenschaftler*innen

DISCUSSION

How many members does the Polish Constitutional Court have?

MIKOŁAJ BARCZENTEWICZ — 8 January, 2016

The Polish Constitutional Court (the 'Court') will soon consider the constitutionality of a new statute that regulates the Court's procedure (case K 47/15). The statute in question, amending the Act on the Constitutional Court, introduced *inter alia* a novel decision-making procedure and has been criticised as infringing the Court's constitutionally guaranteed independence. One highly problematic aspect of the new statute is that it aims to disable the Court from using the old procedure to assess the constitutionality of the new procedure. The Court has already opted to proceed notwithstanding the new rules, acting directly on the basis

of the Polish Constitution, thus implicitly confirming that it does not view itself bound by the new statutory procedure (or, for that matter, by the old procedure). It will not be possible here to do justice to all the complex issues involved (a longer overview is available here). Hence I will focus on the crucial issues concerning the required quorum and of the number of the Court's members.

The impugned legal norms

It is almost inconceivable, given the Court's latest judgments, that the result of this case will be anything other than a declaration of unconstitutionality of at least some of the legal rules at issue. The rules most likely to be held unconstitutional are the requirement of a thirteen-member quorum (according to the Constitution there are fifteen judges in total) and a qualified majority of 2/3 for the Court to rule in many cases (currently, ordinarily only five-member panels and mere majority are required), as well as the rules affecting docket management (limiting the Court's flexibility to prioritise cases). Other rules that may be held unconstitutional deal with impeachment of the members of the Court, but it should be noted that even under the new statute no judge may be impeached without the consent of the Court. The significant change brought by the new statute is, paradoxically, that it is now more difficult to impeach a member of the Court, because consent of Parliament is required (not merely a decision of the Court, as before).

The quorum and majority requirements may not, in themselves, look overly problematic to a comparative lawyer. However, as to the latter, there is a plausible argument based on constitutional interpretation that the

Constitution requires the Court to reach decisions by ordinary majority (the Constitution speaks about a 'majority', without any qualification). Regarding the issue of quorum, it is possible that it would not be seen as a constitutional issue if it was not for the current context.

The problem of quorum: how many judges are there?

The President of the Court, judge Andrzej Rzeplinski, in his decision from 29 December 2015 specified that the case at issue will be heard by the panel of the whole court and then listed the names of ten judges (notice that the new statute sets the minimum at thirteen). It is understandable that the President prefers to convene a full panel, given that he chose to act directly on the basis of the Constitution, setting aside statutory procedure. For him to chose any other number than the full panel could be easily criticised as arbitrary, if not unlawful.

The listing of ten names means that the President of the Court believes that no judges have taken office in 2015, whereas five judges finished their term of office that year, in effect leaving five seats vacant. The problem is that Parliament elected five judges in October and then – after the Parliamentary elections and a significant re-shuffle of the political scene – declared the October election of judges invalid and elected five new judges (on 2 December 2015). Since the Parliamentary elections, the cabinet, the parliamentary majority and the President of Poland all come from the same political party ('Prawo i Sprawiedliwość' or 'PiS'). The President of Poland, Andrzej Duda, refused to recognize the validity of the October election of judges and did not allow those then elected to be sworn in. However, President Duda took oaths from the December judges.

Hence, the December judges are, at least *prima facie*, both elected and sworn in. And yet, the President of the Court refuses to recognise them as judges.

What complicates matters is that the Court has already held (in the judgment K 34/15 from 3 December 2015) that the legal basis to elect two out of five judges in October 2015 was unconstitutional, but that the legal basis for electing the remaining three was constitutional. Strictly speaking, the Court has not yet ruled on the validity of the *elections* of judges, neither in October 2015, nor in December 2015. The Court merely considered the validity of *the legal basis* for them (the power-conferring norm). It is still open for the current parliamentary majority to claim, as it does, that notwithstanding the validity (constitutionality) of the power-conferring norm, there were other severe procedural defects that rendered the October elections legally invalid (all five of them, not merely two). The Court will hear the case concerning the December elections on 12 January 2016 (case U 8/15), but the October 2015 elections will be beyond the scope of those proceedings.

On 23 December 2015, the Office of the Court published a curious, anonymous '*communication*' online responding to the critics of the Court. The document states, incorrectly, that the Court held in the judgement K 35/15 from 9 December 2015 that the three out of five December *elections* were unconstitutional. That statement is incorrect, because the Court in K 35/15 did not consider the validity of the judicial elections. The Court merely ruled on the constitutionality of parts of the Act on the Constitutional Court. According to the governing party, Parliament did not rely on the impugned rules of the Act when electing the judges in December. Hence, unconstitutionality of the rules

of the Act determined in K 35/15 is irrelevant to the validity of the December elections. Leaving that aside, the document says nothing about the remaining pair of judges elected and sworn in. If they are judges of the Court, then the President of the Court should have included them in the panel of the whole court that is supposed to hear the case of the new procedural statute. Perhaps it may even be said that it would be unlawful for the President not to include them whenever the Court is acting directly on the basis of the Constitution (and thus in a full panel). Including those judges would be unlikely to affect the outcome and would signal willingness to solve the constitutional problem.

What lies ahead

One path towards some sort of settlement, allowing two of the judges elected by the new parliamentary majority in December to sit, has been rejected by the President of the Court, Andrzej Rzeplinski. This may suggest that the Court will determine on 12 January 2016 (in U 8/15) that all of the December 2015 elections were invalid (it is highly controversial whether, *de lege lata*, the Court has the legal power to actually invalidate an election of a judge by Parliament, but I will leave that aside). If so, then from the Court's perspective there are currently thirteen judges (the old ten and the three from October 2015), but three of them cannot sit before being sworn in by the President of Poland. The President of Poland in turn made it clear that he considers that all of the October 2015 elections are invalid and that he will not take the oaths from the persons then elected. From the governing party's perspective, a perspective shared by the President of Poland, there are fifteen judges (the old ten and the five from December, already sworn in). No one can tell what exactly will happen.

It is hard to escape the conclusion that the longer the affair lasts, the less likely the parties involved are to reach an agreement.

Mikołaj Barczentewicz is a Lecturer in Law at Jesus College of the University of Oxford.

ISSN 2510-2567

Tags: *Comparative Public Law*, *Constitutional Courts*, *Poland*

Related

A new Solange judgment from Germany - or nothing to worry about?
22 March, 2016
In "Current Developments"

Interrogating "Constitutionalism of the South" and New Pathways for Research: The Case for a Central America in the Global Debate
7 August, 2017
In "Global South in Comparative Constitutional Law"

The Proportionality Critique Still Stands
12 August, 2015
In "Discussion"

PREVIOUS POST
Symposium: Prior consultation in Latin America – The Case of Colombia

NEXT POST
Relaunching Völkerrechtsblog 2016

No Comment

Leave a reply

Logged in as ajv2016. Log out?

SUBMIT COMMENT

☐ Notify me of follow-up comments by email.

☐ Notify me of new posts by email.